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ABSTRACT

Establishing constitutional government involves not simply the creation of a written document that purports to create the political structure of a nation and guarantee rights to its people, but "constitutionalism" in the sense of meaningful and effective adherence to constitutional norms of democratic organization and the protection of individual liberty, even when the cost of that adherence is sacrifice of what seems temporarily expedient. An examination of the nature of constitutional democracy focuses on antimajoritarian limits to the power exercised by democratic political processes. The conditions in Central and Eastern Europe in which constitutional creation would take place are surveyed. The hardly ideal conditions include the need for fundamental political and economic reforms, ethnic and cultural tensions, a lack of established political parties, and potential military insecurity. Despite potential barriers, the momentum for establishing constitutional government existed throughout the region and it was supported by most of the world. Additional elements that are central to establishing a well-functioning constitutional democracy are discussed, some of them specific to federal systems, some vital to any constitutional democracy whether federal or unitary. Among provisions of the U.S. Constitution that are critical to one or both types of democracy are measures mandating cooperation among constituent states as well as protection of their integrity; freedom of movement; the Supremacy Clause mandating that the federal constitution shall be the supreme law of the land; an independent judiciary; control of military organizations; and the right to amend the Constitution. (DB)

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REFLECTIONS ON THE ESTABLISHMENT OF CONSTITUTIONAL GOVERNMENT IN EASTERN EUROPE

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Reflections on the Establishment of Constitutional Government in Eastern Europe

Jonathan D. Varat*

In the apocryphal exchange between an American anxious to improve the aesthetics of his yard and an archetypical Englishman, the American asks, "How can I have a lawn as beautiful as yours?" The Englishman's reply: "Start growing your lawn six hundred years ago!" The most effective advice on how to grow constitutional democracy in the countries that we probably inaccurately group together as belonging to Eastern Europe might take a similar tack. Successful constitutional democracy in the West, particularly in the United States, Britain, and a number of Commonwealth nations, did not sprout all at once. It grew, with sporadic freedom-enhancing measures that fertilized its soil, from at least the time of Magna Charta in 1215. Not only were there many periods during which constitutional democracy was fragile or vulnerable, but any serious reader of history must be aware of how unusual its stable maintenance is and how it must constantly be tended in order to assure its survival and flourishing. Most importantly, it must be tended not just by the government agents of the populace, but by the people themselves through their participation and their firm, preferably peaceful, insistence on its preservation.

The establishment of constitutional government is both an idealistic and a practical undertaking. It is idealistic in its recognition that all human beings are entitled by virtue of their humanity to certain basic freedoms and to government that operates

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in the interest of their welfare. It is mundanely practical insofar as it is premised on the recognition of human ambition and self-interest, and the dangers that those human qualities present when combined with the bestowal of political power. It is also intensely practical in its search for mechanisms of government structure and enforcement of procedural and substantive freedoms that successfully will constrain the abuse of government power without disabling it entirely.

By "establishing constitutional government," I mean not just the creation of a written document that purports to create the political structure of a nation and guarantee rights to its people, but "constitutionalism" in the sense of meaningful and effective adherence to constitutional norms of democratic organization and the protection of individual liberty, even when the cost of that adherence is sacrifice of what seems temporarily expedient. To hold to a fundamental and stable framework of democratic, liberty-respecting values despite the most tumultuous of policy disagreements among a nation's contending factions is the essence of the constitutional spirit.

Much ink has been spilled arguing against the admittedly antimajoritarian features of constitutional, as distinguished from pure, democracy.[1] One powerful form of rebuttal to that position invokes the primacy of securing the "Blessings of Liberty" above even democratic control. Not the grace of government,

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[1]. See Sunstein, Constitutionalism and Secession, 58 U. Chi. L. Rev. 633, 636-43 (1991), for a probing response to this claim. My discussion here borrows heavily from Sunstein's useful account.

democratically or otherwise selected, but the inalienable and natural rights of human beings, are the source of our rights to freedom of conscience, to privacy, or to religious choice, for example. The "moral fact that a person belongs to himself and not to others nor to society as a whole"[2] establishes that a person's natural rights precede the state and that government, even democratic government, must justify its need to interfere with natural rights. Government cannot dispense what it does not rightly hold, and even a democratic positivism therefore cannot dispense or condition basic human freedoms.

Unlike the anti-positivist natural rights position, a second line of rebuttal assumes the relevance of the democratic standard. It insists, however, that what is antimajoritarian is not necessarily antidemocratic. Indeed, in choosing what elements to establish as minimum constitutional conditions that cannot be altered without invoking a legitimate constitutional amendment process, those elements that crucially support the long-term sustenance of democratic forms of government--such as rights of political participation, and freedom of speech, press, and association--must be put beyond the reach of current majorities precisely in order to preserve a vital range of democratic decisionmaking by future majorities. Expressive freedoms, including freedom of inquiry, thus are justified both as natural rights of the person and as instrumental rights in the maintenance of a healthy, democratic regime, and so the guarantee of their

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[2]. Fried, Correspondence, 6 Phil. & PUb. Aff. 288-89 (1977).

protection is preeminently indispensable in establishing constitutional government. I can do no better than to quote Justice Hugo Black of the United States Supreme Court:

> "Freedom to speak and to write about public questions is as important as is the heart to the human body. In fact the privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death."[3]

More particularly, the absolute freedom of individuals to criticize their government must be guaranteed if constitutional democracy is to survive. That is why it is so disheartening to discover that the most recent draft of the Romanian Constitution apparently would, among other questionable limits on freedom of expression, allow the government to restrict the right to defame the country or the government.[4] As a distinguished American law professor first wrote a generation ago:

> "[P]olitical freedom ends when government can use its powers and its courts to silence its critics. [T]he presence or absence in the law of the concept of seditious libel defines the society. . . . If . . . it makes seditious libel an offense, it is not a free society, no matter what its other

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[3]. Milk Wagon Drivers Union v. Meadmoor Dairy, 312 U.S. 287, 301-02 (1941).

[4]. Summary Report of Proceedings, Central and Eastern European Law Initiative Technical Assistance Workshop on the Draft Romanian Constitution, p.2 (August 19-23, 1991).

characteristics."[5]

Structural elements of constitutions that depart from pure majoritarianism--or even from pure proportional representation--may also be justified as strategies for preserving liberty, by dividing and balancing power. When a bicameral legislature's second house is not elected strictly according to population, as when it is apportioned by constituent sub-sovereigns of a federal nation, the design is to introduce a different perspective that will promote more prudent deliberation from distinctive viewpoints and offset the possibility of majority tyranny. Separating the legislative, executive, and judicial powers, and dividing legislative competence between national and constituent republics or states, are also designed to establish competing centers of power to foster more sustained reflection before government's coercive power is brought to bear on the citizenry and to thwart the concentration of power in one or a small set of hands that is the very definition of tyranny. These multiple centers of power, superimposed on the innate ambitions of human personalities, can act to prevent domination by one center because of the resistance of the others. The theory of constitutionalism rejects the romantic notion of utopian societies consisting of altruistic individuals. It does not assume cooperation for the good of the people, but creates a structure that forces cooperation, dialogue, and compromise. It presupposes that the different centers possess real power, for

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[5]. Kalven, A Worthy Tradition: Freedom of Speech in America 63 (Harper & Row 1988).

without that condition the practice will not match the theory. That is only one reason why it has been so crucial in American constitutionalism, at least, that the judicial branch was made independent by providing the appointed justices with life tenure and guarantees that their salaries will not be reduced--in retaliation for decisions unpopular with other government officials or for any other reason.

The arresting notion, recently elaborated by Professor Sunstein, that there are some subjects whose legislative examination might be so debilitating to the political process that they should be constitutionalized beyond the reach of politics also deserves mention.[6] Sunstein suggests that keeping potentially explosive and intractable issues such as private property or religion off the political agenda by constitutional prohibitions on their infringement may facilitate the political process by limiting factional conflict in government.

A little elaboration of the religion example may be helpful. Besides acting as an additional support for the constitutional right freely to exercise one's religion, the American Constitution's First Amendment ban on government establishment of religion was designed to liberate politics from religious strife. The "belief that a union of government and religion tends to destroy government and degrade religion"[7] has animated

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[6]. Sunstein, supra note 1, at 639-40.

[7]. Engel v. Vitale, 370 U.S. 421, 431 (1962). In the Engel case, the Supreme Court held that New York state officials violated the Establishment Clause by composing a nondenominational prayer

Establishment Clause jurisprudence. The Bulgarian draft constitution, by denominating the Eastern Orthodox Church as the "traditional Bulgarian religion,"[8] and the Polish government's introduction of religion into public school activities,[9] dangerously appear to ignore the pragmatic underpinnings of that belief.

That departures from leaving all matters to majoritarian political processes are sometimes justified to secure human freedom or to facilitate democratic rule does not mean, of course, that any lesser justification will do, or that any such justification ought not to be scrutinized carefully before adopting particular norms as constitutionally fundamental and so beyond the reach of ordinary politics. A constitutional democracy is legitimate only insofar as the government derives its power from the consent of the governed, and the necessity of having agents of the people exercise government power introduces the separate interests of government

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and authorizing its use in the state's public schools, even though individual students could opt not to repeat it.

[8]. Constitutional Reform in Bulgaria: A Summary Report of a Workshop, p. 3, The American Bar Association Central and Eastern European Law Initiative (CEELI) (June 19-22, 1991).

[9]. Rapaczynski, Constitutional Politics in Poland: A Report of the Constitutional Committee of the Polish Parliament, 58 U. Chi. L. Rev. 595, 606n.24 (1991) ("In August 1990, two weeks before the beginning of the school year and without any prior consultations with Parliament, the government issued a regulation introducing religion in public schools, despite the fact that public opinions polls had indicated that most parents opposed the move. [Although it removed the issue from the presidential election campaign,] very little attention seems to have been paid to its long-term consequences on the separation of church and state.")

officials in the maintenance of their own positions as an additional factor needing control--a factor surely known all too well among the peoples of Central and Eastern Europe. Controlling even democratically elected agents by effectively rendering them subject to the rule of law is a key ingredient of constitutional democracy. Assuming the will exists to make democratic politics and respect for human rights the norm, and to establish power-allocating arrangements that will effectuate those aims, we need to address the realities of internal and international context in which the constitutional creation process must take place, and the specific content of the provisions that ought to be built into each country's constitutional framework. Neither nation by nation analysis, nor a comprehensive delineation of what a workable constitution should include, is possible here. Some limited observations may be of interest, however.

Constitutional Creation in Context

A realist must begin with the conditions in which those who would create constitutional democracy find themselves. In Central and Eastern Europe the conditions are hardly ideal. The transition from authoritarian communist systems to free democratic regimes must overcome significant impediments. Transition is itself always difficult. In this instance, economic impoverishment and uncertainty about the nature of the future economic system--especially the scope and intensity of the commitment to privatization and the development of a market economy--must be

resolved at the same time that political reform occurs.[10]

One or the other would be challenge enough. Simultaneous political and economic reform is doubly challenging. It is not that one should be delayed in favor of the other. That would risk the accomplishment of neither. Economic freedom and vitality, on the one hand, and political liberty and democratic vigor, on the other, are too interconnected to believe that constitutionalism can take hold without both. One need not embrace the view that capitalism, and its failings, should remain virtually unregulated to agree with the general point that "[p]olitical and intellectual freedom cannot be achieved without economic freedom."[11] Indeed, it is worth reflecting on the degree to which the habit of freedom, independence, and responsibility that accompanies the liberty to choose how one will employ one's private property and talents in economic pursuits reinforces expectations of freedom in other personal and social pursuits--and vice-versa. But the enormity of the task of transition should escape the attention of no one.

The challenge of peacefully containing and resolving long-repressed ethnic and cultural tensions in nations without a tolerance for multi-cultural pluralism is also formidable. Even in

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[10]. See Epstein, All Quiet on the Eastern Front, 58 U. Chi. L. Rev. 555, 557 (1991) ("Eastern Europe faces three problems: the first is that of transition; the second is the pressing need to deal with the questions of racial and ethnic divisions; and the third is its inability to forge a durable social consensus on the necessity of strong institutions of private property for both political liberty and economic growth.")

[11]. Kozinski, The Dark Lessons of Utopia, 58 U. Chi. L. Rev. 575, 581 (1991), citing Milton Friedman, Capitalism and Freedom Chicago, 1982).

the United States, with its long history of stable democracy, these are formidable challenges. When heterogeneity of language and culture assume more significant proportions, the difficulties of constitutional resolution increase dramatically, as Canada's recent experience with separatist sentiment in Quebec makes clear. The draft provisions of Bulgaria's constitution that would restrict the political activities of ethnic and religious groups[12] unfortunately succumb to the temptation of repressing these differences rather than resolving them through inclusion by guaranteeing equal protection of the laws for all, or by other means. Both for reasons of respect for human rights and for promoting democratic stability in multi-ethnic nations, the proposed Bulgarian approach is exactly backwards.

Adding to the difficulties of Eastern European transition to constitutional democracy is the absence of competitive established political parties, experienced democratic movements, or organized defenders of human rights. That is not entirely as true of some countries in the region, such as Czechoslovakia[13] and Poland, as it is of others. Yet one of the ravages of Communist domination was surely the enfeebling or destruction of organized opposition groups. More generally, the absence of a history incorporating strong elements of constitutional democracy, checked powers, and the rule of law leaves growing the green grass of liberty a

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[12]. CEELI Report, supra note 8, at 2.

[13]. See Cutler & Schwartz, Constitutional Reform in Czechoslovakia: E Duobus Unum?, 58 U. Chi. L. Rev. 511, 513-17, 519-20 (1991).

prodigious undertaking.

Although there surely are other major barriers to surmount, the last one I will mention is the potential military insecurity of the region. The task of democratic reform must be complicated to the extent that military power occupies a prominent place in a nation's agenda. Because of economic cost, the historical truth that military needs are often satisfied at the expense of individual or political freedom, and the human inability simultaneously to wage or be prepared for war and to perfect democracy, a primary focus on military security will drain the energy needed to build a workable constitutionalism. Among other unfortunate lessons, the recent experience in Yugoslavia tends to confirm this one.

Correctly reminding us that arguments at the founding in favor of ratification of the proposed United States Constitution primarily concentrated on the "geostrategic" advantages of union in combatting external threats and eliminating the potential for armed hostilities among the States, Professor Amar, addressing the current situation in Eastern Europe, contends that "the success of democracy in individual countries depends heavily on demilitarization of the entire region."[14] He further suggests that the "key point for Europeans today is that internal constitutional reform is not enough."[15] Instead, "[c]ontinental legal

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[14]. Amar, Some New World Lessons for the Old World, 58 U. Chi. L. Rev. 483, 494 (1991).

[15]. Id., at 497.

institutions like the EEC and NATO must be developed or expanded to create a continental environment conducive to commerce and demilitarization."[16]

However much I agree that "economic cooperation and demilitarization went hand in hand under the Federalist Constitution[,]"[17]and that demilitarization across Eastern Europe would not only be desirable in its own right but would facilitate democratic reform efforts in the countries located there, I fear the risk that what ultimately may prove to be unsuccessful efforts to achieve regional demilitarization will be used as an excuse for failing to proceed firmly with the consolidation of internal reforms. Certainly internal reform ought not to be postponed while these nations await the arrival of demilitarization. Nor would it be wise, in my opinion, to draw attention away from necessary internal reforms to concentrate on international security arrangements. It is always easier, personally and nationally, to look outward rather than inward to solve enduring problems, but it is also less valuable in the long run. The threat of military confrontation is a major distraction from sound constitution-making that must be addressed, but taking on too much in that sphere should not be allowed to substitute for the painstaking construction of constitutional government. For now, "internal constitutional reform" is enough and should receive priority.

The lesson to be drawn from a realistic understanding of the

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16. Id.

17. Id., at 496.

current Eastern European predicament is not one of despair but of recognition and dedication to grapple with the genuine elements that may jeopardize successful conversion to democratic, liberty-preserving politics. Positive factors supporting constitutional reform coexist with negative factors that stand in its way. Most fundamentally, the fresh air of freedom is blowing through the region and is being inhaled by broad segments of society who yearn for more and are willing to work hard to keep it circulating. The momentum for establishing constitutional government is abroad, not just in one nation, but in many, and it is supported by most of the world. The availability of modern communications technology increases the potential for sharing of democratic hopes, successes, information, and ideas. With the end of the Cold War and the rapprochement between the United States and whatever will replace the Soviet Union, more constructive uses of the diplomatic energies of the superpowers can be bent towards the support of burgeoning democracy. At the very least, Soviet power is not deployed <u>against</u> democratic reform, but is redirected towards its own attempts at liberalization.

More tangibly, the international processes of the Western European democracies are available to support, indeed in some instances to demand, constitutional reform before lending assistance. Not only NATO and the EEC, but the European Court of Human Rights, the Council of Europe, and the European Commission of Human Rights, are available. The Czech and Slovak Federative Republic (CSFR), for one, has made it possible for their citizens

to petition the Commission by joining the Council, and the CSFR apparently intends to "accede to the jurisdiction of the European Court" as well.[18] Just a week or two ago the Conference on Security and Cooperation in Europe apparently agreed to improve the prospects for adherence to the human rights obligations of the Helsinki Accords by authorizing fact-finding missions to investigate suspected human rights violations within member nations whenever ten member nations or senior CSCE officials approved--although it stopped short of adopting more intrusive enforcement mechanisms. None of these international measures can or should operate in lieu of domestic mechanisms for policing government abuses, but they ought to buttress the adoption and execution of domestic constitutional reforms. Furthermore, the prospect of broader European economic integration cannot help but assist in the arduous transition to workable market economies.

The hardships and tensions confronting the nations of Eastern Europe, as each moves at its own pace and in its own direction toward democratization, cannot easily be compared with the very different historical, social, and economic conditions of the American States during the period from 1776-1787 when they broke from Britain as a group, together fought a war for independence, and then struggled their way towards "a more perfect Union" embodied in the United States Constitution. Not the least of the differences is that the American States possessed market rather than planned socialist economies and that the American States

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[18]. Cutler & Schwartz, supra note 13, at 537.

shared with Britain some democratic and libertarian traditions and codified some of those traditions in their own liberal constitutions at the moment of independence. Although both groups of new sovereigns gained independence from the hegemony of a previously controlling empire, the local embrace of communist control in Eastern Europe certainly was more pervasive than the colonial embrace of British control. The considerable room left to the geographically remote American colonies for developing democratic institutions has no counterpart in Eastern Europe, and a primary common language in the colonies surely facilitated those developments in a way that the linguistic barriers within and among the nations of Eastern Europe does not so readily allow.

Yet, interestingly, despite the differences between these two otherwise strikingly disparate periods of constitutional creation, the initial thrust of their respective constitution-makers was and is to secure constitutional government primarily through reliance on a democratically elected legislative body. The first state constitutions following the Declaration of Independence from Great Britain wholly embraced popular sovereignty in the course of rejecting rule by the King,[19] just as a number of Eastern European nations appear to be embracing democratic legislative supremacy in the wake of arbitrary executive and judicial rule.[20] Perhaps on

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[19]. See Belz, Constitutionalism and the American Founding, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 483-4 (MacMillan 1986).

[20]. See, e.g., Cutler & Schwartz, supra note 13, at 551 (noting that Presidents Havel's proposals for "direct election of the president and the expansion of presidential powers run counter to the parliamentary tradition of Czechoslovakia's earlier

this point Eastern Europe can benefit from the American experience, for the early State constitutions were soon found wanting for lack of effectiveness in controlling legislative power. By the time the federal Constitution was formulated 11 years later, a stronger system of checks and balances, an increased role for courts in imposing constitutional law restraints on legislative authority, and express provisions prohibiting certain kinds of legislative arbitrariness and regulation, were deemed necessary to preserve the constitutional freedoms of the populace.[21] When recent experience consists of executive and judicial authority arrayed against political and individual liberty, it is understandable that the initial reaction is to rely on elected legislators to preserve democracy. As the American states learned, however, there are also significant risks in putting too many constitutional democratic eggs in one legislative basket. Reform, not rejection, proved to be the wiser course. A system of checks and balances prominently featuring an independent judiciary proved to hold the best hope of subjecting all government officials, including legislative officials, to the rule of law.

The Content of the Constitutional Framework

In the course of my comments about the nature of constitutional democracy and the internal and international context

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democratic experience, and to the widespread concern about a return of dictatorship"); Rapaczynski, supra note 9, at 623-25 (discussing the "Polish Preference for a Powerful Legislature"); Summary Report of Proceedings, supra note 4, at 10 (noting the Romanian draft Constitution's "tilt in favor of the legislative branch").

[21]. See Belz, supra note 19, at 484.

in which Eastern Europe efforts at constitutional creation must take place, I have suggested a number of specific provisions that appear crucial to the success of the enterprise at hand. It would be arrogant, and in any event beyond the scope of this discussion and my ability, to suggest a detailed constitutional document that is best for each of the diverse nations that comprise Eastern and Central Europe. Certainly no one constitution would serve all equally well.

Nor would I contend that every feature of the United States Constitution, or even all of its major elements, should be adopted. The United States is a federal nation, unlike the majority of nations in this region, and even the survival as federal nations of the CSFR, the USSR, and Yugoslavia is uncertain. Apart from the relevance of constitutional provisions concerning federalism, some very basic questions of constitutional organization at the national level sensibly could be resolved in ways quite different from the American resolution. Powerful arguments have been made, for example, that parliamentary systems are more likely to secure democracy than presidential systems, especially in times of regime transition and under conditions of a polarized, volatile electorate.[22] The American success story is explained as an exception to a dominant historical pattern of greater stability and flexibility under parliamentary systems, which are said to be more effective at responding to crises without the higher risk of

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[22]. An excellent presentation of this view can be found in Linz, The Perils of Presidentialism, 1990-91 Journal of Democracy 51.

"regime crisis" supposedly presented by presidential governments.[23]

A second major point of choice is whether legislative elections ought to be based on the principle of majoritarian or proportional representation. I tend to agree with Professor Rapaczynski's critique[24] of the Polish preference for proportional representation--especially with his view that it is preferable that political coalitions be constructed before elections, as majoritarian representation systems encourage, rather than after elections, as is more likely in a proportional representation system. Nonetheless, I know of no reason to assume that constitutional democracy cannot succeed under a system of proportional representation. Universal adult suffrage with guarantees that each person's vote counts equally with every other person's may be a prerequisite of a properly egalitarian constitutional democracy, but majoritarian representation, even if preferable, is not.

Having made these disclaimers, and with no pretense of being exhaustive, there are several additional elements I would urge as central to establishing a well-functioning constitutional democracy. Some are specific to federal systems. Some are vital to any constitutional democracy, federal or unitary.

Federal systems are worth establishing and preserving for several reasons, including the crucial reason that citizens may look to local power to resist central government abuse and to

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[23]. Id., at 65.

[24]. Rapaczynski, supra note 9, at 616-21.

central government power to resist local government abuse.[25] A successful federal system will accommodate diversity without threatening unity. To maximize the advantages of unification and diversification, and to resolve the tensions between them, is a formidable task, however, and three successful features of the United States Constitution furnish a valuable paradigm.

First, Article IV of the Constitution, the States' Relations Article, contains a variety of measures mandating cooperation among the constituent States, obligating the central government to protect their democratic integrity, and guaranteeing citizens in each that they will not suffer unwarranted discrimination when they enter and operate in any other State.[26] Provisions designed to inculcate the reality of being bound together in a common nation are absolutely essential to a federal system. The guarantee of interstate equality embodied in Article IV's Privileges and Immunities Clause, moreover, is not only designed to enhance political union but to secure equal treatment of individuals regardless of where they live in that union.[27] The notion that an interstate or inter-republic equality provision is crucial to political unification also may increase the likelihood that other

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[25]. See Amar, supra note 14, at 497-506. See also McConnell, "Federalism: Evaluating the Founders' Design," 54 U. Chi. L. Rev. 1484, 1504-07 (1987).

[26]. See generally, Varat, Economic Integration and Interregional Migration in the United States Federal System, in COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA 44-45 (Greenwood Press 1990).

[27]. See Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. 487 (1981).

proposals aimed at binding the national and constituent governments to provide equal protection of the laws to their own citizens more readily will be appreciated on similar grounds of moral fairness and political integration. The more occasions for recognizing the appeal of equality, the more likely it is that the populace will become habituated to equality values.

Second, freedom of movement, temporary or indefinite, from one part of a federal nation to another must be guaranteed as a basic right. In addition to the obvious liberty dimension of that right, its protection will invigorate the competitive incentive for a federal nation's constituent governments to foster conditions that will at a minimum not drive its people to go elsewhere. That incentive, in turn, should provide the populace with a better, less stagnant set of living choices.[28]

Third, Article VI of the U.S. Constitution mandates that the federal constitution, federal laws, and treaties "shall be the Supreme Law of the Land" before which conflicting state law must fall. The Supremacy Clause is a necessary rule of conflict resolution that permits local law to experiment and operate unless and until the national representatives of the people, or the fundamental law of their Constitution, indicate that national interests require a uniform governing rule. Without it, political unification is seriously endangered. That is why it is so disappointing to learn that the Czech and Slovak Federative

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[28]. Id., at 34.

Republic is unlikely to adopt a similar provision.[29] Given the presence of democratic opportunities to change or abandon uniform national rules, and to amend the Constitution, there is normally no justification for extralegal measures, and as between the choice of national or local law, the law of the more broadly represented constituency has the greater claim to legitimacy.

Even within a unitary government, supremacy of the Constitution as paramount law is vital to the ability of the people to control their elected or appointed government agents. Executive, administrative, legislative, or judicial action--all must be conducted within the limits of constitutional authorization. Constitutional limitations must be understood as binding law, not just aspirational ideals. Their designation in the nation's fundamental document as supreme and binding law facilitates the successful checking of those officials who would be tempted to intrude on power allocated elsewhere in government or on protected freedoms. The commitment of all to abide by the constitution is most effective when it is a commitment to the rule of law that places certain actions beyond the realm of acceptability and beyond the reach of ordinary politics to authorize.

An independent judiciary not beholden to any other officials for their tenure or compensation can be used, of course, as one method of enforcing the Constitution as supreme, binding law. Sometimes it may be the only effective method of checking the

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[29]. Cutler & Schwartz, supra note 13, at 528-29.

invasion of the rights of unpopular or powerless minorities. Even if that enforcement power is withheld from the judiciary--an unfortunate choice, I think--the paramount law status of constitutional principles remains important as a guide to those, including the electorate, who do possess enforcement power. Of separate import, an independent judiciary is essential for the interpretation and application of nonconstitutional law as well. Unimpeded opportunity to manipulate and compromise the integrity of law, whatever its source or status, could not be more corrosive of constitutional democracy. In short, the repeated calls for the establishment of independent judiciaries in Eastern Europe are sound no matter what the law the judiciary is asked to enforce, and even more compelling when the judiciary is charged with constitutional enforcement.

Because armed organizations pose a special potential danger to democratic freedom, it is also critical that democratic constitutions provide for control of military and paramilitary organizations by electorally accountable civilian representatives. Again the aim is to control the people's agents so that they carry out democratic policy and not make and enforce their own. The reported intentions of Hungary and Romania to require parliamentary authorization for military deployment are promising first steps in this direction.[30]

One right that ought not to be included in a federal constitution is a right of a constituent government to secede. The

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[30]. See Amar, supra note 14, at 509n.84.

Soviet Constitution includes that right; Croatia and Slovenia have created one for themselves; and a draft of the Slovak constitution would do the same.[31] It is not that secession will, or necessarily ought to, be prevented by omitting a constitutional right to secede. Rather, as Professor Sunstein argues, "constitutional recognition of the right to secede" threatens "ordinary democratic processes" by diverting attention from the substance of policy, allowing "minority vetoes on important issues," and encouraging destructive strategic behavior.[32] As he urges, "waiver of the right to secede should be seen as a natural part of constitutionalism."[33]

The right to amend the Constitution is quite a different story. If a constitution is to express the fundamental principles of democratic organization and human liberty within the bounds of which democratic policymaking is to occur, it should not be as readily amendable as ordinary legislation. On the other hand, providing for the power to amend through a supermajoritarian process, in order to reflect changes in the society's fundamental values or to correct judicial or other official interpretations at odds with widespread views of what the Constitution does or should mean, leaves open the necessary avenue for peaceful evolution instead of violent revolution. This is precisely what Article V of the U.S. Constitution does.

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[31]. Sunstein, supra note 1, at 633, 634nn.5 & 6.

[32]. Id., at 670.

[33]. Id.

In paying some attention to Article IV regarding relations among States, the amendment process addressed in Article V, and the Supremacy Clause of Article VI, I deliberately have sought to supplement the more frequently noted features of the separation of the legislative, executive, and judicial branches in Articles I, II, and III and the Bill of Rights Amendments that followed the Constitution adopted at Philadelphia. Having filled in some blanks, let me briefly return to the question of what personal rights it is wise to include and exclude from the basic constitutional document. The centrality of freedoms of speech, press, political association, religion, and privacy has already been affirmed. Procedural freedoms that are antidotes to the risk of arbitrary incarceration are equally vital. These would include a number of components of fair process for defending oneself against criminal charges.

What all of these freedoms generally have in common, whether substantive or procedural, is that they are shields against the deployment of coercive government power. By contrast, several of the draft Eastern European constitutions also contain provisions purporting to guarantee affirmative or welfare rights, such as employment, education, and medical care. These include Czechoslovakia,[34] Poland,[35] and Romania.[36] Though perhaps not

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[34]. See Cutler & Schwartz, supra note 13, at 535-6.

[35]. See Rapaczynski, supra note 9, at 611-13; Comments on the Draft Polish Constitution, American Bar Association Central and East European Law Initiative (CEELI) 4-5 (July 5, 1991).

[36]. See Summary Report of Proceedings, supra note 4, at 2-3.

surprising for nations habituated to socialist experience, they raise potentially profound issues of constitutional rights as legally binding obligations. Even in the Czechoslovakian form of split-level rights, under which those rights designed to keep government at bay are fully enforceable as a matter of constitutional law and those obligating government to provide affirmative support are only enforceable through implementing legislation,[37] the risk that "constitutional rights" will be understood generically, and will sometimes not be understood as enforceable law, poses real concerns about nonenforcement when the occasion is more compelling and the conditions for judicial enforcement are more realistic. Furthermore, principled arguments support reserving budgetary allocation decisions for democratic politics rather than constitutional law.[38] At the very least, one ought to think very seriously about how belief in constitutional law may be affected generally by promises that are not likely to be kept before enshrining such social rights in a constitution.

Constitutional Law as a Common Language

A thriving constitutional democracy is one in which constitutional norms are regularly and meaningfully enforced and the contours of constitutional law are a routine part of public deliberations and dialogue. In that kind of political system,

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[37]. See Cutler & Schwartz, supra note 13, at 536.

[38]. Compare Bork, The Impossibility of Finding Welfare Rights in the Constitution, 1979 Wash. U. L. Q. 695, with Michelman, Welfare Rights in a Constitutional Democracy, 1979 Wash. U. L. Q. 659, and L. Tribe, AMERICAN CONSTITUTIONAL LAW 1336 (2d ed. 1988).

constitutional law is a common language binding people together, whatever the other linguistic or cultural barriers that divide them. The value of that common language, together with more observably tangible enforcement benefits, leads me to two final suggestions.

The first, primarily to guard against the most dangerous invocations of coercive government power, is to provide a constitutional guarantee of independent judicial review of individual claims of illegal detention. The model in mind originated in the English writ of habeas corpus, the minimum function of which is to assure an available regular mechanism for reviewing the validity of confinement. The American Constitution provides that the "Great Writ" not be suspended unless necessary during rebellion or invasion,[39] and although its supplemental scope may be left to legislative modification, even in its most modest form it performs a valuable service in deterring and correcting instances of arbitrary imprisonment.

The second proposal also draws on the American experience. Contrary to the centralized forums of judicial review adopted in most European countries, I would urge consideration of a decentralized, fully integrated system of judicial review, in which courts or other adjudicative bodies at every level possess the jurisdiction, and assume the obligation, to measure any contested official act against the requirements of the Constitution. When constitutional issues are potentially part of any adjudicative

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[39]. U.S. CONST. Art. I, § 9, cl. 2.

proceeding, citizen access to constitutional enforcement mechanisms multiplies and the intersection of constitutional and nonconstitutional law becomes more vivid.[40]

Some sort of Supreme Court would be needed to resolve conflicts in constitutional rulings at lower judicial levels, of course, but the existence of potentially differing rulings should provide increased opportunities for reflection, debate, and attempts at persuasion concerning the resolution most consistent with the nation's particular commitments to constitutional and democratic values. The objective is not only more thoughtful resolution of potentially intractable issues, but education and participatory struggle within a tolerant, open democratic tradition. One should not underestimate the value of providing real opportunities for the broad-based embrace of peaceful debate about the proper content of constitutional norms.

To infuse a nation with habits of constitutionalism is an imperative, if intangible goal. Beyond offering effective enforcement of constitutional principles, universal judicial review holds great promise in facilitating the adoption of constitutional law as a common language. It is a proposal deserving of serious examination.

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[40]. Insofar as the Polish draft Constitution separates "judicial review of legislation from the review of the legality of executive and administrative action, vesting the latter power in a special Administrative Tribunal" and the former in the Constitutional Tribunal, see Rapaczynski, supra note 9, at 610, it sacrifices the benefits of an overview of the integrated legal system. In my view, that is unfortunate.